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NO. 91048-1

SUPREME COURT OF THE STATE OF WASHINGTON

SEIU HEALTHCARE 775 NW,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES and FREEDOM FOUNDATION,

Respondents.

RESPONSE BRIEF OF STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES TO FREEDOM FOUNDATION'S CROSS APPEAL

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I. INTRODUCTION

At issue in the Freedom Foundation's (Foundation) Cross Appeal are three Public Disclosure Act issues. The first issue is whether the trial court abused its discretion when it granted Service Employees International Union's (SEIU) request for a Temporary Restraining Order (TRO). The Foundation argues that a TRO may be granted only if the movant can prove that it would be entitled to a *permanent* injunction. The Foundation's argument conflates the standards and ignores the fact that a TRO, unlike a permanent injunction, is not intended to reach the merits. A TRO may be granted so long as the movant can show a *likelihood* of success and a necessity to maintain the status quo pending a ruling on the permanent injunction.

The second issue is whether a Public Records Act (PRA) requester is exempt from the normal rules of discovery. The Foundation correctly points out that inquiry into a requester's purpose for requesting records is limited by RCW 42.56. The Foundation then argues that in a PRA action, *only* discovery within the scope of RCW 42.56.080 to ensure compliance with the PRA's requirements may occur. This is inconsistent with the civil rules, which apply in all civil cases except special proceedings as defined by CR 81. PRA actions are not CR 81 special proceedings, so the

scope of discovery allowable in a PRA action is governed by the civil rules.

Finally, this Court is asked to award reasonable attorney fees and costs under RAP 18.1 and RCW 42.56.550(4). The Foundation requests fees for dissolving what it alleges is an improperly issued TRO. The PRA authorizes payment of fees when a person prevails against an agency, but it does not authorize assessments against the agency when a third party obtains an order preventing release of records. The Department of Social and Health Services (DSHS) would have released the records had it not been restrained by order of the superior court. DSHS is still prepared to produce the records if the restraining order is lifted or if directed to do so by this Court.

II. STATEMENT OF THE CASE

DSHS relies on the Statement of the Case previously articulated in its May 1, 2015, Response Brief to SEIU's Appeal.

III. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion by Ordering a TRO Pending a Hearing on a Preliminary Injunction

The Foundation argues that the trial court applied the wrong standard and abused its discretion when it issued a TRO pending the

consolidated hearing on the preliminary and permanent injunction. The Foundation's arguments are without merit.

The granting or withholding of an injunction is addressed to the sound discretion of the trial court, to be exercised according to the circumstances of each case. *WFSE v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983) (citing *Alderwood Assocs. v. Wash. Envtl. Coun.*, 96 Wn.2d 230, 233, 635 P.2d 108 (1981)). The appellate court will not disturb the trial court's exercise of discretion unless it is based on untenable grounds, or is manifestly unreasonable, or is arbitrary. *State Ex. Rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). This is a high burden, which the Foundation's showing cannot meet here.

There are three ways for a party to stop the release of public records: (1) a TRO pursuant to CR 65(b); (2) a preliminary injunction pursuant to CR 65(a); or (3) a permanent injunction pursuant to CR 65 and RCW 42.56.540. In order to obtain any of these forms of relief, a party must show (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to the moving party. *Tyler Pipe Indus., Inc. v. Dep't of Rev.*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).

Overlaying that general standard for an injunction is the standard in RCW 42.56.540, which specifically governs the court's power to enjoin the production of a record under the Act. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407 n.2, 259 P.3d 190 (2011). "Under RCW 42.56.540, a court may enjoin production of requested records if an exemption applies and examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions." *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 719, 328 P.3d 905 (2014).

Although they look to the same factors, a TRO or preliminary injunction (on one hand) and a permanent injunction (on the other) serve different purposes and demand different burdens. While a permanent injunction goes to the ultimate merits of the case, a TRO or a preliminary injunction is intended merely to preserve the status quo until the trial court can conduct a full hearing on the merits. *Ameriquest v. Atty. General,* 148 Wn. App. 145, 157, 199 P.3d 468 (2009) (citing *Nw. Gas Ass'n v. Wash. Util. & Transp. Comm'n*, 141 Wn. App. 98, 115-16, 168 P.3d 443 (2007)), *aff'd on other grounds*, 170 Wn.2d 418, 241 P.3d 1245 (2010). As such, preliminary injunctive relief is available whenever the movant

can show a *likelihood* that it will ultimately prevail based on the *Tyler Pipe* requirements. *Nw. Gas,* 141 Wn. App. at 116.

The Foundation poses that the initial hearing for a TRO should be subject to the same rigorous standard that is required for a permanent injunction to issue. The law does not establish such a stringent standard. Temporary and preliminary injunctions merely require a likelihood of success at hearing, and pursuant to CR 65(b), a TRO can be entered just on the plaintiff's pleadings and affidavits. Contrary to the assertion by the Foundation, the Court of Appeals' decisions in *Ameriquest* and *Nw. Gas* do not state that a court must grant a temporary injunction even when the moving party fails to prove the likelihood of prevailing on the merits. (Foundation brief at 29). In both of those cases the parties agreed to the initial TRO. *Ameriquest*, 148 Wn. App. at 153; *Nw. Gas*, 141 Wn. App. at 109.

In this case, the court below performed a sufficient likelihood of success analysis at the TRO hearing, and ruled that SEIU had made a "sufficient showing" to temporarily enjoin disclosure. CP at 252-53. The Foundation fails to show that the trial court overstepped its broad discretion by making this ruling.

B. The Trial Court Properly Applied the Civil Rules and Compelled Discovery

The Foundation argues that the trial court erred by allowing SEIU to compel limited discovery. In the Foundation's view, a PRA requester may not be subject to *any* discovery except for an agency's inquiry regarding the applicability of an exemption or prohibition pursuant to RCW 42.56.080. Because the PRA does not support such a categorical limitation on discovery, this court should reject the Foundation's argument.

1. The civil rules of discovery control in PRA cases.

Discovery in a PRA action is governed by the civil rules. *Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 716, 261 P.3d 119 (2011). This is because CR 81 provides that the civil rules govern except where inconsistent with rules or statutes applicable to special proceedings. "[T]he PRA statutes do not create a special proceeding subject to special rules." *Neighborhood Alliance*, 172 Wn.2d at 716. The scope of discovery allowable in a PRA action is governed not by the Foundation's policy arguments, but by the civil rules.

Under the civil rules, any party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." CR 26(b)(1). This rule applies evenhandedly to

all parties during litigation: "there is no authority in the civil rules to limit their application to plaintiffs." *City of Lakewood v. Koenig*, 160 Wn. App. 883, 890, 250 P.3d 113 (2011). Subject to the limitations of RCW 42.56.080, a PRA requester is required to comply with the same discovery rules as any other civil litigant.

RCW 42.56.080 relieves a requester of any burden to provide information as to the purpose for the request except to determine the applicability of an exemption or prohibition. Stated differently, discovery is authorized to determine whether the intended use is for a prohibited use or if another exemption applies. Nothing in this section purports to convert a PRA action into a special proceeding. The statute only limits inquiries concerning use of the records, but does not limit other appropriate relevant discovery inquiries. The requester may be required to provide information for some *other* purpose. The trial court properly applied the civil discovery rules. This Court should decline to invent a new discovery doctrine for PRA actions.

2. The trial court did not abuse its discretion by compelling discovery.

It is well settled that civil discovery rules are given broad and liberal construction. *McGugart v. Brumback*, 77 Wn.2d 441, 444, 463 P.2d 140 (1969). Questions concerning discovery are matters within the

sound discretion of the trial court in furtherance of the goal of full disclosure of relevant information. *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 232, 654 P.2d 673 (1982), *aff'd.* 467 U.S. 20, 104 S. Ct. 2119, 81 L. Ed. 2d 17 (1984). As such, the trial court's decision may be reversed only if that decision is "manifestly unreasonable or based on untenable grounds or untenable reasons." *In re Marriage of Littlefield*, 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997). Stated differently, the court abuses its discretion if no reasonable person would have ruled as the court did. *In re P'ship of Rhone & Butcher*, 140 Wn. App. 600, 606, 166 P.3d 1230 (2007), *review denied*, 163 Wn.2d 1057 (2008). The Foundation cannot make that difficult showing here.

The Foundation argues that its declarations rendered discovery needless, and rendered the trial court's order an abuse of discretion. *See* CP at 267-69. The Foundation points to *Ameriquest v. Atty. General*, 177 Wn.2d 467, 300 P.3d 799 (2013). But this Court in *Ameriquest* did not hold that a declaration may obviate discovery as a matter of law. Rather, this Court deferred to the trial court's sound discretion in declining to order further discovery. *Id.* at 493-94. The trial court below considered the *Ameriquest* analysis and determined that under these specific facts, the Foundation's declarations were not enough to end the discovery inquiry. CP at 279. The Foundation fails to show that no reasonable judge would

have ruled as the trial judge did. Therefore, just as this Court did in *Ameriquest*, this Court should defer to the trial court's broad discretion and affirm.

C. Freedom Foundation Has Not Prevailed Against DSHS for the Production of Records and Is Not Entitled to Costs or Fees From DSHS

The Foundation requests payment of costs and fees pursuant to RAP 18.1 and RCW 42.56.550(4). The Foundation does not specify from *whom* it seeks costs and fees. Nevertheless, the Foundation is not entitled to receive any costs and fees from DSHS, because DSHS did not breach the PRA.

Reasonable attorney fees or expenses may be awarded only if allowed by applicable law. RAP 18.1(a). A party that requests fees or expenses must provide argument and citation to authority in order to advise the court of the appropriate grounds. *Wilson Court Ltd. P'ship v. Tony Maroni's Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998) (citing *Austin v. U.S. Bank*, Wn. App. 293, 313, 869 P.2d 404 (1994)).

The PRA authorizes attorney fees to a person who prevails against an agency in seeking to inspect or copy public records. RCW 42.56.550(4). The purpose of this provision is to encourage disclosure and to deter agencies from improperly denying access to records. *Confederated Tribes of the Chehalis Reservation v. Johnson*,

135 Wn.2d 734, 757, 958 P.2d 260 (1998). But when a record is withheld as a result of a *third party*'s action, with no interference by the agency, there is no misconduct to deter and fees are not authorized against the agency. *Id.* That is exactly the case here.

Following the Foundation's request for records, DSHS timely identified and provided all responsive records except for two lists containing the names of approximately 31,000 Individual Providers. DSHS would have released the records but for an order of the superior court and the Court of Appeals. The agency is still prepared to produce the records if the restraining order is lifted or if directed to do so by the Court. Just as in *Confederated Tribes*, DSHS has done nothing to withhold the records at issue, and assessing fees against the agency would serve no purpose recognized by the PRA.

IV. CONCLUSION

The trial court applied the proper standards and properly exercised its discretion in making its TRO and discovery rulings. This Court should decline to adopt the Foundation's novel tests, and should not constrain the trial court's well-established discretion to rule on discovery and injunctive

relief. This Court should not assess fees and costs against DSHS, in the absence of any wrongdoing by the agency.

RESPECTFULLY SUBMITTED this 15 day of June, 2015.

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